96-1852

Supreme Court, U.S.
FILED
JUL 10 1996
CLERK

No. 95-1582

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ORIENTATIONS GALLERY, INC.

Petitioner,

v.

BAKERY CENTRE ASSOCIATES, a Joint Venture,
MARTIN Z. MARGULIES, as Managing Joint Venturer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Alan T. Dimond, Jr., Esq.
Counsel of Record
Elliot H. Scherker, Esq.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Respondent

14 pp

QUESTION PRESENTED

Whether certiorari should be granted to review minor differences in procedures adopted by the Courts of Appeals to address a deficiency in the provisions of the Financial Institutions Reform, Recovery and Enforcement Act that govern the authority of the now-defunct Resolution Trust Corporation to remove state appellate proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

REASONS WHY THE PETITION SHOULD BE DENIED . . 2

1. The Eleventh Circuit's Rule 3

2. The View from the Circuits 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page

Chambers v. NASCO, Inc.
501 U.S. 32 (1991) 8

FDIC v. Keating
12 F.3d 314 (1st Cir. 1993) 7

FDIC v. Yancey Camp Development
889 F.2d 647 (5th Cir. 1989) 3

In re Savers Federal Savings & Loan Assoc.
872 F.2d 963 (11th Cir. 1989) 3

Jackson v. American Savings Mortgage Corporation
924 F.2d 195 (11th Cir. 1991) 3

Matter of Meyerland
960 F.2d 512 (5th Cir. 1992) (en banc),
cert. denied, 506 U.S. 1049 (1993) 7, 8

Metro North State Bank v. Gaskin
34 F.3d 589 (8th Cir. 1994) 7

Reilly v. Waukesha County, Wisconsin
993 F.2d 1284 (7th Cir. 1993) 7

RTC v. Allen
16 F.3d 568 (4th Cir. 1994) 7

RTC v. Bayside Developers
43 F.3d 1230 (9th Cir. 1995) 7

RTC v. Nernberg
3 F.3d 62 (3d Cir. 1993) 6-9

TABLE OF AUTHORITIES
(CONTINUED)

Page

United States v. Hasting
461 U.S. 499 (1983) 8

United States v. Horn
29 F.3d 754 (1st Cir. 1994) 8

Statutes

12 U.S.C. § 1441a(*l*) 6

12 U.S.C. § 1441a(*l*)(1), (3) 6

12 U.S.C. § 1441a(m)(1) 6

12 U.S.C. § 1441a(m)(3) 6

12 U.S.C. § 1819(b)(2)(B), (D) 6

Miscellaneous

Raul Rubiera, *Space Age Colosseum?*
MIAMI HERALD, June 27, 1996 2

Son of Bakery Centre
MIAMI HERALD, March 3, 1996 5

No. 95-1582

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ORIENTATIONS GALLERY, INC.

Petitioner,

v.

BAKERY CENTRE ASSOCIATES, a Joint Venture,
MARTIN Z. MARGULIES, as Managing Joint Venturer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Bakery Centre Associates and Martin Z. Margulies, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's Opinion in this case. That opinion is reported at 54 F.3d 688.

REASONS WHY THE PETITION SHOULD BE DENIED

Certiorari should not be granted to review minor differences in procedures adopted by the Courts of Appeals to address a deficiency in the provisions of the Financial Institutions Reform, Recovery and Enforcement Act that govern the authority of the now-defunct Resolution Trust Corporation to remove state appellate proceedings.

"Like the ruins in Rome, the remains of South Miami's Bakery Centre stand as a monument to another era."[1/] So too, this case — with its bouquet redolent of emergency bank takeovers and hand-to-hand litigation between creditors of failed financial institutions and the now-defunct Resolution Trust Corporation (RTC) — is truly a remnant of another era, albeit one more recently past. The question is whether the varying approaches taken by the Courts of Appeals to the knotty procedural issues raised by removal to federal court of pending state appellate proceedings, raised before this Court in the context of a case that began its life as a simple eviction of a tenant from a failed shopping mall, warrant this Court's attention.

Respondent submits that the minor differences among the solutions offered by the courts to the boondoggle created by the Congress' failure to foresee the problems of removing appellate proceedings do not call for a writ of certiorari. Petitioner, having inexplicably neglected to follow the clearly-established procedure set forth by the Eleventh Circuit, is merely seeking to save his claim by asking the Court to adopt some other procedural variant as the governing rule.

1/ Raul Rubiera, *Space Age Colosseum?*, MIAMI HERALD, June 27, 1996 (Neighbors/Kendall at 4).

1. The Eleventh Circuit's Rule.

In 1991, the Eleventh Circuit offered its approach to the removal of state appellate proceedings by federal agencies charged with responsibility for failed financial institutions. *Jackson v. American Savings Mortgage Corporation*, 924 F.2d 195 (11th Cir. 1991). The case involved a removal of a state appellate proceeding by the RTC's predecessor, the Federal Savings & Loan Insurance Corporation (FSLIC) and raised a question of first impression in the Circuit, *i.e.*, how to process a state appeal after removal to a federal district court. *Id.* at 198.[2/] The Eleventh Circuit identified the core concern:

> If a state court judgment is deemed to have been entered by a federal district court and the district court has no opportunity to address the issues before review by this court, we are, essentially, exercising appellate jurisdiction over state court proceedings. We are, however, not a *state* appellate court. The role of a federal court of

---

2/ The Eleventh Circuit had touched on the issue in *In re Savers Federal Savings & Loan Assoc.*, 872 F.2d 963 (11th Cir. 1989), but — contrary to petitioner's view of that case — did not "authorize a federal appeal to proceed where a new federal notice of appeal was filed after removal." (Pet., p.7). Rather, that case was removed after final judgment in state court *and before the institution of appellate proceedings*. *Id.* at 965. The only issue passed upon by the court was whether the FSLIC could file a timely notice of appeal, and the case did not touch upon removal of a pending *appellate* action. *Ibid.* The only other appellate decision that approached the question was *FDIC v. Yancey Camp Development*, 889 F.2d 647 (5th Cir. 1989), in which the FDIC, after having removed a pending appellate proceeding to federal court, sought to vacate the state judgment under Rule 60(b) rather than moving forward with the appeal. *Id.* at 648-49.

> appeals is to review the actions and judgment of a *federal district court* * * *.

924 F.2d at 198 (footnote omitted).

The court chose to resolve the tension between its role and the practical concerns attendant to a removal with a truly modest proposal:

> [W]hen a case removed to a federal court has in it at the time of removal an order * * * which, had it been entered by a district judge, would be appealable to this court, it shall be incumbent on the party seeking an appeal first to move that the district judge modify or vacate the order or judgment. Should the district judge refuse to modify or vacate, then the fiction that the state court judge's acts were the acts of the district judge will have been converted into reality. After the district judge enters an order refusing to modify or vacate or enters a new order or judgment, a party may appeal to this court * * *.

Id. at 199 (footnotes omitted).

This procedure "assures that the alleged errors brought before this circuit for review are in fact as well as theory the considered products of a district judge" and "prevents this court from presuming to be that which it is not — a state appellate court." *Ibid.* To give some finite limitations to the rule it had announced, the court declared that the deadlines of Rule 59(b) of the Federal Rules of Civil Procedure would apply, *i.e.*, "[t]he district judge should give a dissatisfied party ten days from the removal date to file the motion." *Id.* at 199 n.9.

The present action was instituted in state court by respondent, who sought to evict petitioner from the Bakery Centre shopping mall; petitioner counterclaimed for breach of contract, constructive eviction, and rescission. (Pet. 11a). The Bakery Centre was then deeded to its lenders (Flagler Federal Savings & Loan Association and an affiliated entity), and petitioner filed a

third-party complaint against Flagler Federal, which then added its own count for nonpayment of rent. *Ibid.* Respondent and Flagler Federal successfully moved to dismiss the third-party complaint and the counterclaim. Petitioner's appeal from the order of dismissal was pending in the state appellate court when Flagler Federal failed and the RTC was appointed receiver for the institution. *Id.* at 6a, 12a.[3]

On July 16, 1992 — approximately 18 months after *Jackson* had been decided by the Eleventh Circuit — the RTC removed both the pending trial case and the appellate proceeding to the United States District Court for the Southern District of Florida. *Id.* at 12a. While petitioner filed a motion to remand within seven days of the removal, it inexplicably failed timely to file a motion to vacate under *Jackson*'s dictates. *Id.* at 6a,12a.[4] The Eleventh Circuit thus applied *Jackson* to hold that petitioner was barred from reviving its state appeal in federal court. (Pet. 7a-9a). Having had the consequences of noncompliance with controlling circuit law visited upon it, petitioner is asking this Court — in the exercise of a power usually reserved for the resolution of important issues of federal law — to adopt some *other* rule and thereby preserve its state appeal in federal court.

---

[3] The Bakery Centre, as noted at the outset of this brief, was demolished after being sold to a new owner and is currently being rebuilt. *Son of Bakery Centre*, MIAMI HERALD, March 3, 1996 at B2.

[4] The petition hints at an excuse for this dereliction, and not in complete fidelity to the record. The 10-day period for filing a motion to vacate expired on July 26, 1992; nonetheless, petitioner seems to believe it important to note that south Florida was struck by a violent hurricane "*[t]hree weeks after removal*," that the law offices of its counsel were destroyed in the hurricane, and that the Supreme Court of Florida promulgated an emergency extension of all time periods from August 23 - September 7, 1992. (Pet., p.3 n.2 (emphasis added)). These events, however, occurred almost one month after petitioner's deadline for filing its motion to vacate had expired, and appear to be of marginal pertinence, at best.

2. The View from the Circuits.

The RTC's removal powers were conferred by 12 U.S.C. § 1441a(*l*), under which provision "any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States" and the RTC accordingly "may remove any action, suit, or proceeding from a State court" to federal district court when it has been appointed conservator or receiver. 12 U.S.C. § 1441a(*l*)(1), (3).[2] After the advent of the Eleventh Circuit's *Jackson* decision, the other Circuits were called upon to address the amenability of state appellate proceedings to

---

[2] The RTC is out of business as of December 31, 1995. 12 U.S.C. § 1441a(m)(1). Because the statute further provides that the Federal Deposit Insurance Corporation (FDIC) shall assume the RTC's "conservatorship and receivership functions," 12 U.S.C. § 1441a(m)(3), petitioner argues that the issue raised in the petition "is one which is capable of repetition and needs to be considered" by this Court notwithstanding the RTC's demise. (Pet., p.7 n.3). The FDIC, however, unlike the RTC, has limits on its removal power: the FDIC may remove "any action, suit, or proceeding" to which it is a party, with the *exception* — ignored by petitioner — of state actions in which only "preclosing rights" are involved and those "in which only the interpretation of [state] law is necessary; such actions "*shall not* be deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(B), (D) (emphasis added). The FDIC removal statute thus "restricts federal court jurisdiction over actions involving purely state law questions," while the RTC removal statute "does not exclude such cases" and allowed the RTC "to remove routine collections and foreclosure cases," *RTC v. Nernberg*, 3 F.3d 62, 68 n.3 (3d Cir. 1993). It is thus plainly the case, with the RTC closed and only the FDIC's limited removal power remaining, that far fewer run-of-the-mine state cases — such as the landlord-tenant dispute that spawned this litigation — will find their way to the local federal courthouse. That being so, there is yet less heft to petitioner's call upon this Court's certiorari power.

federal removal — with, it readily must be admitted, different approaches being taken.

What all these approaches have in common, however, is an effort by the circuits "to fit the square peg of the removal statute into the round hole of existing federal court procedures." *RTC v. Nernberg*, 3 F.3d 62, 68 (3d Cir. 1993). The courts are not making doctrinal declarations, but instead are adopting rules in the exercise of their *supervisory powers* over the district courts. *Id.* at 68; *see Matter of Meyerland*, 960 F.2d 512, 520 (5th Cir. 1992) (en banc), *cert. denied*, 506 U.S. 1049 (1993).[9] The

---

[9] Thus, the Fifth Circuit chooses to have the district court "take the state judgment as it finds it, prepare the record as required for appeal, and forward the case to a federal appellate court for review." *Meyerland*, 960 F.2d at 520. The First Circuit takes the same approach, while acknowledging that the district court's adjudicatory role in this context "is limited by the awkward posture of a case removed during the pendency of a state appeal," *FDIC v. Keating*, 12 F.3d 314, 317 (1st Cir. 1993), and is joined by the Eighth Circuit. *Metro North State Bank v. Gaskin*, 34 F.3d 589, 591-92 (8th Cir. 1994); *see Reilly v. Waukesha County, Wisconsin*, 993 F.2d 1284, 1287 (7th Cir. 1993) (*dictum* approval of *Meyerland*). The Third Circuit, on the other hand, has opted to meld the *Jackson* and *Meyerland* approaches. *RTC v. Nernberg*, 3 F.3d at 68-69 (parties may move to modify or open state judgment after removal within 30 days; after passage of 30 days without motion being filed, district court shall adopt state judgment). The Fourth Circuit rejects *Meyerland* entirely, favoring "a hybrid of the Eleventh and Third Circuits' approach" under which the district court is immediately to adopt the state judgment but thereafter to consider any post-judgment motions. *RTC v. Allen*, 16 F.3d 568, 573 (4th Cir. 1994). The Ninth Circuit has aligned itself with the Fourth Circuit. *RTC v. Bayside Developers*, 43 F.3d 1230, 1236-38 (9th Cir. 1995). Petitioner offers nothing in its petition to support the notion that any of these approaches is *doctrinally* more sound than the Eleventh Circuit's rule; rather, the essence of its position is simply that an application of *any*

(continued...)

Eleventh Circuit's construct, awkward and slapdash though it may be, is no more so than the Fifth Circuit's command that a federal district court blindly adopt a state court's judgment as its own. *Meyerland*, 960 F.2d at 525 (Politz, C.J., dissenting) ("[b]y a deft brush of legal legerdemain the majority automatically vests federal appellate jurisdiction over a state court case which has, somehow, passed through the precincts of a powerless district court judge"). The circuits are, in the words of the Third Circuit, "play[ing] the hand that Congress dealt us." *RTC v. Nernberg*, 3 F.3d at 68 (citation omitted). In doing so, no doctrinal conflict is created.

One might just as easily argue, for example, that a conflict among the Circuits is created by the vagaries of local rules promulgated under the authority of Rule 47 of the Federal Rules of Appellate Procedure. In the same sense, the supervisory powers of the courts of appeals indisputably allow those courts to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). In particular, the courts may act under their supervisory powers "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citation omitted). And such action is generally regarded as appropriately taken to fill a procedural void, such as the Congress left in Section 1441a(*l*). *See United States v. Horn*, 29 F.3d 754, 760 (1st Cir. 1994) ("the supervisory power doctrine is interstitial in the sense that it applies only when there is no effective alternative provided by rule, statute or constitutional clause") (citation omitted).[7] The slight

---

[6](...continued)

rule other than that of the Eleventh Circuit would have allowed its state appeal to have been litigated in state courts. (Pet., p.10). That one approach may be more convenient, however, does not in and of itself make this case one that cries out for review in this Court.

[7] As the Third Circuit observed in setting forth its supervisory rules in this instance:

(continued...)

variations among the circuits in the format for the removal of state appellate cases by the RTC simply does not so disturb the tranquility of the law as to warrant intervention by this Court.

CONCLUSION

Respondent requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

Alan T. Dimond, Esq.
Counsel of Record
Elliot H. Scherker, Esq.
Greenberg, Traurig, Hoffman,
Lipoff, Rosen & Quentel, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500

Counsel for Respondent

July 10, 1996

---

[7](...continued)

> Although the customary rules-drafting process is more apt to produce a better product, we recognize the necessity of action to address cases presently being removed to federal courts, and thus adopt ... supervisory rules for the district courts within this Circuit.

RTC v. Nernberg, 3 F.3d at 68 (footnote omitted).